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8

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**
11

12 DFSB KOLLECTIVE CO. LTD.,

13 Plaintiff,

14 vs.

15 CJ E&M, INC., a Korean corporation;
16 CJ E&M AMERICA, INC., a California
corporation,

17 Defendants.
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21
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CASE NO: 2:15-cv-01650-SVW-FFM

DEFENDANTS' *EX PARTE*
APPLICATION FOR ORDER
CONTINUING PRE-TRIAL
CONFERENCE AND TRIAL DATE;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF

[Declaration of Timothy B. Yoo and
Proposed Order Submitted Concurrently
Herewith]

Pretrial Conference: 2/22/2016

Trial Date: 3/1/2016

Assigned to Hon. Stephen V. Wilson

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that pursuant to Federal Rules of Civil Procedure
 3 6(b), and Local Rule 7-19, defendants CJ E&M America, Inc. and CJ E&M
 4 Corporation (collectively, “Defendants”) hereby apply for an order continuing the
 5 pre-trial conference and trial date.

6 This application is made on the following grounds:

7 (1) Good cause exists for an order continuing the pre-trial conference and
 8 trial date for at least 60 days. Despite the diligent efforts of Defendants to prepare
 9 this matter for trial, there is substantial discovery remaining, including the
 10 depositions of the 30(b)(6) witnesses for both the Korean Plaintiff and Defendant
 11 companies, discovery from non-party witnesses residing in Korea and China, as well
 12 as expert discovery (including that of Korean law experts residing in Korea).
 13 Should this application be denied, the discovery-related deadlines set for February
 14 pursuant to the Court’s standing order and Local Rule 16-6.1 do not allow sufficient
 15 time for Defendants to complete and resolve all pending discovery issues relating to,
 16 among other things: (a) the numerous Korean law issues raised by Plaintiff’s expert
 17 witness, Mi Hwa Chung, whose report spans hundreds of pages; (b) Plaintiff’s
 18 pending *ex parte* application to compel Defendants to produce the entirety of the
 19 computer code, scripts, and commands for the mnet.com website, which would
 20 involve collecting information from numerous databases located in Seoul, Korea;
 21 and (c) obtaining trial testimony of several critical non-party Korea-based witnesses
 22 through the Hague Convention; (d) Defendants’ ability to obtain testimony from
 23 Plaintiff’s 30(b)(6) witness on certain crucial topics.

24 (2) In addition to the above, the Court has not yet set a motion cut-off, and
 25 Defendants would request a setting of this date and a later trial so that Defendants
 26 can file appropriate dispositive motion(s) prior to trial in the interest of efficiency. A
 27 later trial date would also permit the parties to participate meaningfully in a private
 28 mediation, as the parties have only recently discussed the possibility of trying to

1 resolve the dispute through mediation.

2 (3) Furthermore, counsel for Defendants, Ekwon E. Rhon and Timothy B.
3 Yoo, have a conflicting trial schedule set to commence on March 9, 2015 in Los
4 Angeles Superior Court in Case No. BC450305, which has been pending over five
5 years.

6 (4) Parties will not be prejudiced if the order is entered because the
7 requested extension of time is minimal; in fact, continuance will give much needed
8 time for each party to complete discovery and explore the possibility of settlement
9 through mediation.

10 (5) *Ex parte* relief is appropriate as Defendants will be irreparably
11 prejudiced if their application is not heard on an *ex parte* basis.

12 On January 20, 2016 at approximately 1:40 p.m., Defendants' counsel
13 notified Plaintiff's counsel via telephone about the relief that Defendants intend to
14 seek, as well as the date and substance of the *ex parte* application. Plaintiff's
15 counsel did not agree to join this application.

16 In support of this application, Defendants submit the following memorandum
17 of points and authorities, the Declaration of and Timothy B. Yoo, pleading and
18 records on file in this case, and on such other matters as the Court may consider.
19

20 DATED: January 21, 2016

Respectfully submitted,

21 Ekwon E. Rhon
22 Timothy B. Yoo
23 Bird, Marella, Boxer, Wolpert, Nessim,
24 Drooks, Lincenberg & Rhon, P.C.

25 By: /s/ Timothy Yoo

26 Timothy B. Yoo
27 Attorneys for Defendants CJ E&M
28 Corporation and CJ E&M America, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants bring this *ex parte* application to continue the trial date and related pre-trial deadlines for a variety of reasons, all of which constitute good cause.

Foremost, there is still substantial discovery to be completed, a vast majority of which needs to be conducted in Korea. Much of this discovery abuts closely with, or in some instances, post-dates the February 1 deadline for the parties to submit a joint exhibit list to the Court. For instance, the depositions of Defendant CJ E&M Corporation's 30(b)(6) witnesses are scheduled to occur between January 27-29 in Korea. Further, Defendants also intend to take the deposition of Plaintiff's 30(b)(6) witness regarding the purported licenses acquired in the songs allegedly distributed through the mnet.com website, and have noticed it for February 1. (Yoo Decl. ¶ 5.) This is discovery that has only recently become necessary.

As background, Defendants have always maintained that regardless of who owned the distribution rights to the songs at issue, distribution in the U.S. through mnet.com could not have occurred because Defendants had blocked that functionality on its website, and thus, the ownership of those songs was a moot issue. Plaintiff, however, in opposition to Defendants' pending motion to dismiss for *forum non conveniens*, submitted on January 4 an as-yet-uncontested declaration from its expert witness claiming that U.S. distribution through the mnet.com website was possible, which Defendants dispute. (Dkt. No. 50-6.) Nevertheless, it has injected into this dispute the question of who owned the underlying distribution rights to those songs in the first place,¹ and the need to take discovery on that issue.

¹ For clarity, the parties had been disputing the underlying ownership rights for the songs distributed via Beats Music. For the songs distributed via the mnet.com website, the salient issue had been whether in fact distribution had occurred at all, which Defendants maintain it has not.

1 Defendants therefore intend to conduct discovery regarding the facts and
2 circumstances surrounding Plaintiff's purported acquisition of the distribution rights
3 to the 267 songs so implicated. Plaintiff has indicated that it will seek a protective
4 order to prevent that deposition from proceeding. (Yoo Decl. ¶ 5.)

5 Moreover, there is significant non-party discovery that needs to be completed
6 prior to the current February 1 critical date. For instance, Plaintiff has noticed a
7 deposition for Beats Music's 30(b)(6) witness, which is set for January 28. Plaintiff
8 has further noticed a deposition by written questions of a witness from the
9 International Federation of the Phonographic Industry (IFPI) sitting in Shanghai,
10 China. (*Id.* ¶ 8.) Defendants' cross-questions are to be submitted by January 25,
11 with re-direct questions due 7 days thereafter, and re-cross questions due 7 days
12 after that. Fed. R. Civ. P. 31. Put differently, it is at best uncertain when this
13 discovery, which pertains to some of Plaintiff's core allegations—that Defendants
14 improperly manipulated ISRCs and in fact distributed music within the U.S.—will
15 be completed. It will certainly be after February 1. Additionally, Defendants are in
16 the process of seeking discovery from the non-party original rights holders, who are
17 located in Korea, through the Hague Convention. This process will also take several
18 weeks to complete.

19 Furthermore, per this Court's earlier order, expert rebuttal reports are
20 presently due on February 1, and expert discovery will commence thereafter. (Dkt.
21 No. 38.) Two of the experts, Plaintiff's Mi Hwa Chung and Defendants' rebuttal
22 expert, both reside in Korea and their depositions would likely have to occur there.
23 (Yoo Decl. ¶ 3.)

24 In sum, the current schedule, including the February 1, 2016 deadline for the
25 parties to submit a joint exhibit list for trial, does not allow sufficient time for
26 Defendants to complete and resolve all outstanding discovery issues, such as: (a)
27 Plaintiff's pending *ex parte* application to compel Defendants to produce the
28 entirety of computer code, scripts and commands for *mnet.com*, a collection effort

1 that would require review of databases in Korea; (b) obtaining trial testimony of
 2 several critical Korean-resident nonparty witnesses through the Hague Convention;
 3 (c) completing remaining fact and expert discovery; (d) whether Defendants will be
 4 permitted to take the deposition of Plaintiff's 30(b)(6) witness regarding the licenses
 5 to the songs concerning mnet.com.

6 Apart from the discovery issues that exist, Defendants request additional time
 7 to file dispositive motion(s) and mediate this matter prior to trial. As the Court has
 8 not yet set a cut-off date for motions and the default cutoff date per the Federal
 9 Rules of Civil Procedure post-dates the current trial date (i.e., March 1, 2016),
 10 Defendants request a continuance in order to have sufficient time in advance of trial
 11 to explore these avenues.

12 Finally, counsel for Defendants, Ekwan E. Rhew and Timothy B. Yoo, have a
 13 conflicting trial set to commence on March 9, 2015 in another case, which has been
 14 pending over five years in Los Angeles Superior Court. While the parties in that
 15 case had hopes of resolving the dispute, recent events confirm that this trial will
 16 proceed.

17 The requested relief for exclusion and continuance should be granted on *ex*
 18 *parte* basis because, given the February 1, 2016 deadline, there is not enough time
 19 for Defendants to seek relief on a regularly noticed motion. For these reasons and
 20 for those listed below, Defendants' *ex parte* application should be granted in its
 21 entirety.

22 **II. ARGUMENT**

23 **A. Good Cause Exists To Continue The Trial Date.**

24 As set forth below, Defendants have good cause for requesting a continuance
 25 of the pre-trial conference and trial dates, and their request for *ex parte* relief is
 26 warranted under applicable law.

27 **1. More Time Is Needed To Complete Fact Discovery.**

28 Foremost, the parties simply need more time to complete fact discovery.

1 Again, as it currently stands, the deadline for submitting a joint exhibit list is
 2 February 1, and the parties have contemplated exchanging proposed exhibits on
 3 January 28, before the depositions of CJ E&M Corporation and Plaintiff's 30(b)(6)
 4 witnesses have been completed (and in the case of the latter, scheduled for a date
 5 certain), and well before expert discovery has even commenced.

6 Furthermore, potentially important non-party discovery remains outstanding,
 7 and it is dubious whether it will be completed by the date of the current trial, much
 8 less by the critical February 1 date. This includes deposition testimony from the
 9 IFPI regarding alleged simulations that it ran showing that overseas access to music
 10 on the mnet.com website was possible, as well as its policies and practices regarding
 11 ISRCs, the alleged manipulation of which is one of the central allegations in this
 12 lawsuit. It also includes, as discussed further below, non-party discovery from
 13 witnesses residing in Korea.

14 **2. The Parties Require More Time To Resolve Outstanding** 15 **Discovery Disputes.**

16 On January 15, 2016, Plaintiff moved *ex parte* to compel Defendants to
 17 produce the entirety of the computer code, scripts and commands for mnet.com.
 18 (Dkt. No. 59.) By way of its *ex parte* application, Plaintiff seeks to obtain a vast
 19 amount of data that are scattered across 500 servers housed in multiple locations in
 20 Korea. This is despite the fact that Defendants have produced relevant categories of
 21 data requested and even offered to allow Plaintiff's retained expert to visit
 22 Defendant's facility in Seoul to assist his analysis concerning the mnet.com source
 23 code. *See* Declaration of Timothy Yoo (Dkt. No. 60-2). As explained in the
 24 Declaration of Young-Rock Pyo, concurrently filed with Defendant's opposition to
 25 Plaintiff's application, it would take *at minimum* one month for a team of 18 CJ
 26 E&M employees to gather, process and produce the requested data to Plaintiff.
 27 (Dkt. No. 60-3.) Therefore, Plaintiff's request that the Court order Defendants to
 28 produce all versions of source code, scripts and commands for mnet.com *within*

1 *three days* of the Court's order granting their application is patently unreasonable.
2 (Dkt. No. 59.)

3 Besides the objections raised by Defendants that the information being sought
4 by Plaintiff is exceedingly disproportionate to the need of discovery and imposes
5 undue burden on Defendants, the Court should not ignore the uncontroverted fact
6 that it will take at least one month for Defendants to be able to produce the
7 requested data. Upon notice of Plaintiff's application, Defendants have commenced
8 the process of identifying data and employees who are available for this task to
9 prepare for the event that the Magistrate Judge would grant Plaintiff's application.
10 Even if Plaintiff prevails on its application, however, the reality dictates that
11 Defendants need at least a month to gather pertinent data from 500 servers in Korea
12 and process them for production.

13 At no fault of Defendants, this timeline goes well beyond the current deadline
14 of February 1, 2016 per Local Rule 16-6.1, which requires the parties to file a joint
15 exhibit list containing the information required by Rule 26(a)(3)(A)(iii) not later
16 than 21 days before the pre-trial conference. Further, the Court's standing order
17 clearly requires the parties to resolve all discovery disputes before the Magistrate
18 Judge not later than 3 weeks prior to the scheduled trial date, i.e., by February 9,
19 2016. *See* the Court's New Case Order (Dkt. No. 8). The fact that Defendants
20 cannot realistically meet these deadlines to effectuate the requested production itself
21 warrants continuance of the pre-trial conference and trial date.

22 **3. Korea-Facing Discovery Through The Hague Convention**
23 **Requires More Time.**

24 Defendants' request for continuance is further justified by the fact that the
25 non-party witnesses from whom critical trial testimony is needed reside in Korea
26 and Defendants are in process of initiating the Hague Convention process to do so.
27 (Yoo Decl. ¶ 7.) The non-party witnesses essential to resolving this dispute and to
28 rebutting the testimony of Plaintiff's expert and fact witnesses are witnesses: (1)

1 affiliated with Sha Label; (2) affiliated with Neowiz and Buda Records; and (3)
2 witnesses affiliated with the companies who Plaintiff claim have granted rights to
3 DFSB concerning the 267 songs at issue, which were allegedly distributed through
4 mnet.com by defendant CJ E&M. (*Id.*)

5 Since they are all foreign nationals, as opposed to U.S. citizens or residents,
6 they are beyond the inherent subpoena power of this Court. *See* 28 U.S.C. § 1783.
7 Under the Hague Evidence Convention, the time for execution of a Letter of
8 Request (for instance, for testimony to be used at trial) to Korea's National Court
9 Administration is estimated to take at least several weeks from receipt.² Further,
10 each Letter of Request and supporting documents will have to be translated from
11 English to Korean, which will require further lead time. In sum, the process by
12 which the parties must try to obtain evidence from critical non-parties out of their
13 control requires time, and the current trial schedule does not allow enough time for
14 either party to effectuate discovery under the Hague Convention.

15 For the aforementioned 267 songs, Defendants have not conceded that they
16 lacked the appropriate distribution rights and therefore will seek discovery from the
17 rights holders that purported to grant "exclusive" rights to DFSB in December 2014,
18 including about the circumstances under which those rights were purportedly
19 granted. This will likely entail witnesses from over a dozen different companies all
20 located in Korea. (*Id.*) Counsel for Defendants are currently working on drafting
21 papers to submit Letters of Request to the National Court Administration in Korea
22 and expect to file the papers within a few days. (*Id.*)

23 Based on the foregoing reasons, Defendants respectfully request the Court to
24 grant them further time to conduct the Korea-facing discovery of non-party
25 witnesses by way of continuing the pre-trial conference and trial date.

26 _____
27 ² *Republic of Korea – Central Authority*, <https://www.hcch.net/en/states/authorities/details3/?aid=846>
28

1 **4. The Parties' Desire To Mediate And Defense Counsel's**
 2 **Scheduling Conflict Further Warrant A Continuance.**

3 The parties have only recently discussed the possibility of trying to resolve
 4 the dispute through mediation. (Yoo Decl., ¶ 9.) This is primarily because
 5 depositions, through no fault of Defendants, had not occurred until December 2015.
 6 (*Id.* ¶ 6.) Defendants remain willing to mediate the dispute and respectfully request
 7 the Court to grant the parties more time to arrange and participate in a mediation.

8 Moreover, counsel for Defendants, Ekwan E. Rhaw and Timothy B. Yoo, are
 9 lead counsel for another case pending at the Los Angeles Superior Court. (*Id.* ¶ 10.)
 10 Trial by the Superior Court judge is set to commence on March 9, 2016, only 8 days
 11 after the first day of trial in this case as currently scheduled. This Superior Court
 12 case has been pending over five years and was set to go to trial on August 18, 2015.
 13 Days before trial, the parties agreed to continue witness testimony and set a briefing
 14 schedule so that the court in that lawsuit had the benefit of the parties' submissions
 15 in advance of testimony. Concurrently, the judge in that action, the Honorable John
 16 Shepherd Wiley, set a March 9, 2016 trial date. (*Id.*) Recent events, including the
 17 death of an expert, has confirmed that Plaintiffs will not agree to a continuance of
 18 the lawsuit. And considering the time passed and the number of continuances
 19 granted, there is no possibility that the trial date will be continued in the Superior
 20 Court case. (*Id.*)

21 Thus, without the Court allowing a continuance, proceedings in both cases
 22 will most likely overlap in time, and Messrs. Rhaw and Yoo will be facing the
 23 unenviable task of having to prepare for two trials in virtually the same time span.

24 **B. Ex Parte Relief Is Appropriate.**

25 An ex parte application may be granted upon a showing of irreparable harm
 26 and that the moving party is without fault in creating reasons that require ex parte
 27 relief. *Mission Power Engineering Co.*, 883 F. Supp. at 492. Here, it is self-evident
 28 Defendants will be irreparably prejudiced if its application to continue is not heard

1 on an *ex parte* basis, particularly given the February 1, 2016 deadline in this case. It
2 is also critical that this *ex parte* application be concurrently decided with
3 Defendants' motion to dismiss on January 25, 2016, because if the Court grants the
4 motion, this *ex parte* application will become moot; but if the Court denies the
5 motion, the relief requested in this application becomes even more critical as the
6 parties are about to commence critical Korea-facing discovery process at a great cost
7 and traveling time to both sides.

8 Moreover, Defendants acted in good faith and in a timely manner in bringing
9 this application. As explained in the preceding paragraphs, the reasons warranting
10 continuance were not created by Defendants. Indeed, Defendants have no history of
11 delaying matters or using dilatory trial tactics.

12 Further, Plaintiff will not suffer prejudice if the order issues. While Plaintiff's
13 counsel may suffer some inconvenience in rearranging schedules for a new trial
14 date, minor inconvenience does not amount to prejudice, and Defendants have no
15 objection to scheduling the continued trial for a time convenient to Plaintiff and its
16 counsel.

17 Finally, Defendants have complied with the procedural requirements of Local
18 Rule 7-19.1. As set forth in the Declaration of Timothy B. Yoo, on January 7, 2016,
19 Plaintiff's counsel communicated to Defendants' counsel that they will not stipulate
20 to any continuance of trial. On January 20, 2016 at approximately 1:40 p.m.,
21 Defendants' counsel notified Plaintiff's counsel via telephone about the date and
22 substance of the *ex parte* application. (Yoo Decl. ¶ 11.) Plaintiff's counsel did not
23 agree to join this request for relief.

24 Accordingly, *ex parte* relief is appropriate.

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1 **III. CONCLUSION**

2 For all of the foregoing reasons, Defendants respectfully request that this
3 Court issue an order continuing the pre-trial conference and trial date.

4
5 DATED: January 21, 2016

Respectfully submitted,

6 Ekwan E. Rhow
7 Timothy B. Yoo
8 Bird, Marella, Boxer, Wolpert, Nessim,
9 Drooks, Lincenberg & Rhow, P.C.

10 By: /s/ Timothy Yoo

11 Timothy B. Yoo
12 Attorneys for Defendants CJ E&M
13 Corporation and CJ E&M America, Inc.
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